

Fracking rules for diesel likely to spread nationally

Mike Soraghan, Environment & Energy Publishing, 6-14-11

U.S. EPA's guidelines for hydraulic fracturing of gas wells with diesel fuel could become a *de facto* nationwide standard for drilling, environmental and industry experts say.

The agency has floated a wide-ranging proposal that suggests well-construction standards, site review and baseline water sampling. There are currently no national rules in those areas, only state regulations and standards recommended by industry groups. And their suggestion in EPA documents does not mean that they would appear in the final guidance, due sometime after autumn.

But creating any kind of standard for drilling and fracturing -- even a specific, rare practice -- sets a marker against which other standards can be measured.

Some states with newly discovered shale gas resources are likely to be looking for standards and could simply adopt EPA's diesel standards. Then states that have looser standards than EPA's could find themselves pressed by environmental groups, surface owners and other residents to tighten their rules.

For industry, this is a worry. Environmentalists see it as an opportunity.

"We hope states will see that as something to look at for non-diesel fracking," said Amy Mall, a senior policy analyst on oil and gas issues for the Natural Resources Defense Council.

Oil and gas companies worry that EPA is seeking to subtly shift its regulatory powers into petroleum production. EPA currently regulates some aspects of production but not the central act of drilling a well.

"There is a concern they will try to do this as a way to backdoor the process," said Lee Fuller, vice president of government relations for the Independent Petroleum Association of America and executive director of IPAA's Energy in Depth campaign. "EPA is looking for ways to insinuate themselves into oil and gas wherever they can."

An EPA spokeswoman said the agency is not looking beyond the language of the law that authorizes EPA to regulate hydraulic fracturing when diesel fuel is used and is not shopping around a first draft of the agency's eventual guidance.

"To be clear -- we have not 'floated standards,'" the spokeswoman said in an emailed statement. "We have circulated a briefing with a series of questions to generate discussion about what stakeholders see as the best approach to providing guidance under existing Class II UIC requirements on the technical aspects of permitting diesel fuel hydraulic fracturing."

The use of diesel fuel in fracturing fluid is far from widespread, but it has a tortuous history on Capitol Hill and at EPA headquarters. Diesel even has its own loophole with a provision in the 2005 energy law that blocked EPA from regulating hydraulic fracturing.

Concerns over diesel

An investigation by fracturing critic Rep. Henry Waxman (D-Calif.), disclosed earlier this year, found that 32 million gallons of diesel was used nationwide between 2005 and 2009. During that time, the country added

more than 67,000 gas wells. Averaged, that makes about 477 gallons of diesel per well, mixed with an amount of water that varies from tens of thousands of gallons up to 6 million gallons.

A 2004 EPA study found that fracturing posed "little or no threat" to drinking water when used in drilling specific formations that yield coal-bed methane. But the study did say that using diesel in fracturing fluid was worrisome.

At the time, Republicans in Congress were writing a massive energy bill and were working to include a short provision exempting fracturing from regulation under the Safe Drinking Water Act. Though the provision gained little media attention, Democrats blasted Republicans for allowing oil companies to inject diesel fuel into drinking water.

Bill drafters forged a compromise. Most fracturing would be exempt from EPA oversight. Critics have since dubbed this the "the Halliburton loophole." But the loophole within the loophole was diesel -- when drillers mixed diesel into their fracturing fluid, EPA could regulate fracturing under the Safe Drinking Water Act.

But it didn't. When the bill passed in 2005, industry representatives said the use of diesel was essentially nonexistent. EPA officials, apparently believing that to be true, did not write any language implementing the regulation of diesel-laced fracturing water for at least five years. But it turned out that drillers and the service companies that do "frack jobs" for them did still sometimes use diesel.

In January 2008, two such service companies acknowledged to Waxman, then the chairman of the House Oversight and Government Reform Committee, that they had used diesel fuel in fracturing. One of the companies continued to tell EPA that it was not using diesel.

Waxman went public with the companies' admissions in 2010.

A few months later, EPA posted rules about fracturing with diesel on its website. The change came without notice or even a press release. IPAA is now challenging that change in federal court.

Punishment for past actions?

Industry officials say their key fear is not whether they will be allowed to use diesel or whether it will be regulated but whether they can be punished for having used it in the past without a permit. That would be unfair, they say, because there was no way to get a permit.

In April, EPA Administrator Lisa Jackson said her agency had begun working on "guidance" about how fracturing with diesel would be handled.

Since then, the agency has held Web-based seminars with gas company representatives, environmentalists and state regulators.

EPA is expected to issue draft guidance this summer -- which would be reviewed by the White House Office of Management and Budget -- and go out for public comment next fall, according to EPA documents. The final version would come out sometime after that, but the EPA documents did not give a time frame.

One of the key questions the agency has identified include how to define "diesel fuel," as some substances might be nearly identical chemically but have a different name. It is also asking stakeholders how many wells using diesel fuels they would expect to need permits.

Industry figures say that if EPA has not yet answered such questions, it can hardly say that drillers should have been getting permits for diesel fracking, much less punish them for failing to get one.

"There's a wonderland quality to it," said Matt Armstrong, a lawyer who represents oil and gas clients for Bracewell & Giuliani. "It's a bad sign when the regulator is asking who should get the permit. It's a sign that it's not well thought through."

The EPA spokeswoman said no such conclusions can be drawn from the questions, which were derived from an earlier round of meetings with "stakeholders."

"The discussions and/or the material," the spokeswoman said, "in no way suggest that it is not possible to obtain a permit."

Asked if that meant that there is a way to get a permit to "frack" with diesel, the spokeswoman replied in an email that "in states where we are the permitting authority, we'd be happy to work with any company that wants a permit and in primacy states, we would provide support to the state agency."